

# DERSHOWITZ MISSES THE MARK ON FREE SPEECH: A CRITIQUE OF *THE CASE AGAINST THE NEW CENSORSHIP*

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## INTRODUCTION

This is a review of Alan Dershowitz's new book, *The Case Against the New Censorship*.<sup>1</sup> The book discusses novel points on the subject, such as how the demographics of anti-free speech advocates are cause for additional concern and some tactical advice for arguing in favor of free speech.<sup>2</sup> Unfortunately, the problems present in the book outweigh these benefits. For example, public and private censorship are conflated throughout the book, and no practical solution to the alleged decrease in free speech is provided.<sup>3</sup> This review mainly focuses on the importance of the public/private distinction, including what private companies, such as Facebook and Twitter, can learn from the harms of government censorship, and the rare entanglement exception in which a private company can be held liable for First Amendment violations.

### I. CONFLATING PUBLIC AND PRIVATE CENSORSHIP

The most prominent problem throughout the book is the conflation of public and private censorship. Even the subtitle of the book references "Protecting Free Speech from Big Tech."<sup>4</sup> But censorship from big tech, such as Facebook and Twitter, is constitutional and, therefore, does not diminish the free speech of its users. If anything, these censorship efforts demonstrate a net *increase* in the use of First Amendment protections because Facebook and Twitter are exercising their First Amendment freedom of association rights.<sup>5</sup>

This pervasive conflation of public and private censorship is further problematic in that it causes ambiguities. For example, Dershowitz states that "the costs of imposing a regime of censorship outweigh the costs of tolerating

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<sup>1</sup> ALAN DERSHOWITZ, *THE CASE AGAINST THE NEW CENSORSHIP* (2021).

<sup>2</sup> *See id.*

<sup>3</sup> *See id.*

<sup>4</sup> *Id.*

<sup>5</sup> U.S. CONST. amend. I.

dangerous speech and its consequences”<sup>6</sup> and that “[y]our right to swing your fist should end at the tip of my nose, but your right to express your ideas should not necessarily end at the lobes of my ears.”<sup>7</sup> These would be excellent points if aimed only at government censorship. But, because Dershowitz toggles between public censorship and private censorship so frequently, it is unclear if these quotes are intended to refer to government censorship, private censorship, or both.

Perhaps even more troubling is that Dershowitz, a Harvard Law School professor, is no doubt acutely aware that censorship from tech companies such as Facebook does not implicate First Amendment protections. At various points in the book, he even makes statements that demonstrate this understanding.<sup>8</sup>

Public views on protecting free speech—i.e., from governmental censorship—are tragically low.<sup>9</sup> Therefore, the importance of clarity on this subject is at a premium. Conflating private and public censorship only creates confusion at a time when clarity is paramount.

## II. ARE FREE SPEECH RIGHTS DECREASING?

The problem of conflating public and private censorship is likely what leads Dershowitz to make the peculiar claim that “[f]reedom of speech in America is facing the greatest threats since the Alien and Sedition Acts of 1798.”<sup>10</sup> While it is ultimately impossible to objectively quantify net effects of the various manifestations of constitutionally protected free speech protections, a rational assessment would likely lead a neutral observer to conclude that people have *more* free speech protections in the current era, not less.<sup>11</sup> While there has been a slight reduction in free speech rights in

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<sup>6</sup> DERSHOWITZ, *supra* note 1, at 31.

<sup>7</sup> *Id.* at 38.

<sup>8</sup> *See, e.g., id.* at 3 (“[T]he current regime of censorship is more dangerous because for the most part it is not prohibited by the First Amendment.”).

<sup>9</sup> *See, e.g., 38% Favor Banning Hate Speech Offenders from Public Office*, RASMUSSEN REPS. (Dec. 03, 2019), [https://www.rasmussenreports.com/public\\_content/politics/partner\\_surveys/38\\_favor\\_banning\\_hate\\_speech\\_offenders\\_from\\_public\\_office](https://www.rasmussenreports.com/public_content/politics/partner_surveys/38_favor_banning_hate_speech_offenders_from_public_office) (discussing voter attitudes on banning offensive speech).

<sup>10</sup> DERSHOWITZ, *supra* note 1, at 1. Again, it is unclear if Dershowitz is referring to government censorship only, or if he is including private censorship in making this statement. The reference point of the 1798 Alien and Sedition Acts may indicate that this is in reference to only governmental censorship. *See id.* Even if Dershowitz was intending to refer to the net effect of all forms of censorship, public and private, the claim is still likely unsubstantiated. This is because speech that would have been censored by private entities in the 1800’s for being profane, blasphemous, or pornographic is tolerated today. *See generally* Tom Head, *Censorship in the United States*, THOUGHTCO. (Dec. 10, 2019), <https://www.thoughtco.com/censorship-in-the-united-states-721221>.

<sup>11</sup> Michael Conklin, *Disappearing Act: Are Free Speech Rights Decreasing?*, 51 SAINT MARY’S L.J. 693, 695 (2020) (“[F]ree speech rights overall have increased in modern years, not decreased.”).

demonstrations on public property,<sup>12</sup> there have been significant increases in other areas. Examples include public figure defamation,<sup>13</sup> flag burning,<sup>14</sup> labor union and corporate spending on electioneering communications,<sup>15</sup> restricting claims of intentional infliction of emotional distress as a means to punish extreme speech,<sup>16</sup> and protections from compelled speech for union members.<sup>17</sup>

### III. LESSONS FROM GOVERNMENTAL CENSORSHIP

Criticizing Dershowitz's conflation of public and private censorship does not mean that the private censorship he speaks out against is desirable. Some of the reasons why government censorship is harmful are also applicable to censorship from social media companies. Consequently, social media companies should be encouraged to consider to what extent the harms from government censorship also apply to their censorship.

History demonstrates that attempts to censor speech frequently result in a net increase in such speech.<sup>18</sup> There is no limiting principle whereby this forbidden fruit effect would apply only to governmental censorship and not private censorship. These attempts at censorship may also inadvertently promote the very message intended to be silenced by allowing the speaker to acquire the status of an oppressed martyr.<sup>19</sup> Therefore, social media companies should think critically about the consequences of their censorship efforts, as they may result in more harm than good.

### IV. PRIVATE CENSORSHIP AS PUBLIC CENSORSHIP

There is a rare circumstance in which private censorship could be considered public censorship—and thus subject to judicial constitutional review. The government cannot circumvent the First Amendment by pressuring or co-opting private sector actors to enact the government's preferred censorship.<sup>20</sup> This is known as the “entanglement” exception to the

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<sup>12</sup> DERSHOWITZ, *supra* note 1, at 701-06.

<sup>13</sup> *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46 (1988).

<sup>14</sup> *Texas v. Johnson*, 491 U.S. 397 (1989).

<sup>15</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

<sup>16</sup> *Snyder v. Phelps*, 562 U.S. 443 (2011).

<sup>17</sup> *Janus v. Am. Fed'n of State, Cnty. and Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).

<sup>18</sup> See, e.g., Michael Conklin, *Hate Speech: An Analysis of Free-Speech Advocacy*, ARK. J. SOC. CHANGE & PUB. SERV., Sept. 16, 2019, at 1, 2-3 (providing examples of how pre-World War II Germany anti-Semitic speech censorship served to invigorate the message and how alt-right provocateur Milo Yiannopoulos received unprecedented exposure for his message after riots blocked him from speaking at the University of California Berkeley).

<sup>19</sup> *Id.* at 3.

<sup>20</sup> See generally *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619-20 (1991) (explaining the state action doctrine); Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State*

state action doctrine.<sup>21</sup> One could argue that recent statements from the executive branch implying that social media companies will face regulatory consequences if they do not conform to government requests are a step in this direction.<sup>22</sup> However, this is still far from the level of co-opting required for the entanglement exception.

There have been a variety of failed attempts to seek legal recourse against private censorship. PragerU—a conservative nonprofit—sued Google for restricting access to its YouTube videos.<sup>23</sup> The court rejected PragerU’s claim that its First Amendment rights were violated due to the censorship allegedly being “entirely ideologically driven.”<sup>24</sup> The court further rejected PragerU’s claim that YouTube violated the Lanham Act by falsely claiming that YouTube values “diverse collections of self-expression.”<sup>25</sup>

Freedom Watch is a conservative activist group that alleged a violation of the Sherman Act after it was banned by Google, Facebook, Twitter, and Apple, alleging the corporations were engaging in anticompetitive behavior.<sup>26</sup> Freedom Watch further alleged that the platforms violated the District of Columbia’s Human Rights Act because it was banned for its political beliefs and religious affiliation.<sup>27</sup> The court ultimately granted the defendants’ motion to dismiss for failure to state a viable legal claim.<sup>28</sup>

Former Democratic presidential candidate Tulsi Gabbard filed suit against Google for blocking her from buying online advertisements for a

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*Action Doctrine*, 2016 BYU L. REV. 575, 584-85, 589-90 (2016) (explaining the state action doctrine and the entanglement exception).

<sup>21</sup> Schmidt, *supra* note 20, at 589-90.

<sup>22</sup> For example, President Joe Biden’s White House Press Secretary, Jen Psaki, warned that “Facebook needs to move more quickly to remove harmful, violative posts.” Robby Soave, *The Government Should Stop Telling Facebook to Suppress COVID-19 ‘Misinformation’*, REASON (July 15, 2021, 5:04 PM), <https://reason.com/2021/07/15/covid-19-vaccines-misinformation-jen-psaki-white-house-biden/>. President Joe Biden also accused social media companies of “killing people” for not engaging in his preferred censorship regarding COVID-19 speech. Salvador Rodriguez, *Biden on Facebook: ‘They’re Killing People’ with Vaccine Misinformation*, CNBC (July 18, 2021, 12:36 PM EDT), <https://www.cnbc.com/2021/07/16/white-house-says-facebook-needs-to-do-more-to-fight-vaccine-misinformation.html>. Furthermore, these statements occurred during a Federal Trade Commission antitrust investigation against technology companies such as Facebook and Google’s parent company, Alphabet. Kelly Anne Smith, *What’s Going on with the Facebook Antitrust Lawsuit?*, FORBES: ADVISOR (May 17, 2021, 4:35 PM), <https://www.forbes.com/advisor/investing/update-facebook-antitrust-lawsuit/>.

<sup>23</sup> Prager Univ. v. Google, L.L.C., No. 17-CV-06064, 2018 WL 1471939, at \*2 (N.D. Cal. Mar. 26, 2018) (granting Google’s motion to dismiss).

<sup>24</sup> *Id.* at \*14.

<sup>25</sup> *Id.* at \*1.

<sup>26</sup> Freedom Watch, Inc. v. Google, Inc., 368 F. Supp. 3d 30, 34 (D.D.C. 2019).

<sup>27</sup> *Id.* at 34-35.

<sup>28</sup> *Id.* at 37.

three-hour period.<sup>29</sup> Gabbard alleged that, because Google is essentially performing the governmental function of regulating an election, her First Amendment rights were violated.<sup>30</sup> The court disagreed and granted Google's motion to dismiss.<sup>31</sup>

Another creative attempt to seek legal recourse for private censorship is that of James O'Keefe—founder of Project Veritas—who sued Twitter in 2021 for banning him from the platform.<sup>32</sup> His claim is based on a theory of defamation and not the First Amendment.<sup>33</sup> He claims that, by falsely stating he was banned for operating fake accounts, Twitter caused harm to his reputation.<sup>34</sup> O'Keefe is unlikely to prevail because, as a public figure, he will have to prove the additional defamation element of actual malice.<sup>35</sup>

## V. VALID POINTS

Dershowitz does occasionally make valid points regarding free speech in the book. He expresses concern over a rarely discussed aspect of modern censorship, namely, that it is young people who are disproportionately likely to not only tolerate but advocate for governmental censorship.<sup>36</sup> This is highly problematic, as these people are the future judges, legislators, and educators of the country.

Similarly, Dershowitz makes the interesting point that low levels of popular support for free speech are even worse than they seem because it is disproportionately liberals with this low support of free speech.<sup>37</sup> This is not the administering of a double-standard by Dershowitz—he does that elsewhere in the book.<sup>38</sup> Rather, this is voicing a valid concern. It is arguably preferable to have conservatives—as opposed to liberals—espouse the anti-free speech position because then it would be liberals who would push back

<sup>29</sup> Timothy B. Lee, *Presidential Candidate Tulsi Gabbard Sues Google for Ad Censorship*, ARS TECHNICA (July 26, 2019, 7:02 AM), <https://arstechnica.com/tech-policy/2019/07/presidential-candidate-tulsi-gabbard-sues-google-for-ad-censorship/>.

<sup>30</sup> *Tulsi Now, Inc. v. Google, L.L.C.*, No. 19-cv-06444-RAO, 2020 WL 4353686, at \*2 (C.D. Cal. Mar. 3, 2020) (granting Google's motion to dismiss through an in chambers order).

<sup>31</sup> *Id.*

<sup>32</sup> Joe Walsh, *Project Veritas Founder James O'Keefe Sues Twitter over Ban*, FORBES (Apr. 19, 2021, 7:01 PM EDT), <https://www.forbes.com/sites/joewalsh/2021/04/19/project-veritas-founder-james-okeefe-sues-twitter-over-ban/?sh=3834b06444b1>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967).

<sup>36</sup> DERSHOWITZ, *supra* note 1, at 2.

<sup>37</sup> *Id.* at 39.

<sup>38</sup> Dershowitz insinuates that the lack of civility in the first 2020 U.S. presidential debate was the fault of liberals refusing to debate conservatives and the promulgation of safe spaces. *Id.* at 53-54. He further alleges that “[Trump is] simply replicating the tone and style of much of what passes today as dialogue on college campuses, social media, and even mainstream television and radio.” *Id.* at 55.

against that, and liberals are historically on more solid ground to do so.<sup>39</sup> This is similar to how some believe supporting high deficits is worse when done by conservatives than liberals because it is the conservatives who are better positioned to fight back against such a policy.

Dershowitz correctly explains that it is unfair to argue in favor of governmental censorship by presenting isolated incidences of speech that society would be better without.<sup>40</sup> Rather, an honest assessment requires a cost-benefit analysis of the net effects of censorship.<sup>41</sup> Dershowitz provides the analogy of how it would be likewise nonsensical to argue against democratic elections by pointing out that it would have been better if Adolf Hitler was never elected.<sup>42</sup> It would have been beneficial for Dershowitz to have expanded on this, as it is a common misunderstanding. People support censorship imagining it will only censor the speech they want censored. However, in reality, it often censors much more.<sup>43</sup>

## VI. CONCLUSION

Issues of free speech and censorship are highly complex. Any effort to alter the matter inevitably leads to unintended consequences. For this reason, criticizing the existing jurisprudence on free speech without providing a concrete alternative is of limited value. Unfortunately, that is largely what Dershowitz does in this book.

As discussed in this critique, Dershowitz does present some interesting information on the topic, such as the significance of the demographic makeup of anti-free speech advocates and some tactful responses to common anti-free speech arguments. Unfortunately, the deficiencies with the book far outweigh these benefits. Readers are encouraged to look elsewhere for more developed and insightful coverage of this topic.

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<sup>39</sup> See, e.g., Jonathan Zimmerman, *When Will Liberals Reclaim Free Speech?*, WALL ST. J. (Apr. 7, 2021, 12:35 PM ET), <https://www.wsj.com/articles/when-will-liberals-reclaim-free-speech-11617813301>.

<sup>40</sup> DERSHOWITZ, *supra* note 1, at 19-22.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 22.

<sup>43</sup> See, e.g., Conklin, *supra* note 18, at 2 (providing the example of the University of Michigan's hate speech codes enacted to protect black students from racist speech being used mostly to punish black students).